

BULLOCK BULLOCK & BLAKEMORE, PLLC
Attorneys and Counselors at Law
110 West 7th Street, Suite 707
Tulsa, OK 74119-1031

Louis W. Bullock
Patricia W. Bullock
Robert M. Blakemore

918-584-2001
918-779-4383 (fax)

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VIA EMAIL: ljsoutherland@rhodesokla.com

Leslie J. Southerland
Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C.
ONEOK Plaza
100 West 5th Street, Suite 400
Tulsa, Oklahoma 74103-4287

Re: *State of Oklahoma v. Tyson et al.*, No. 05-CV-0329-GKF-SAJ

Dear Leslie:

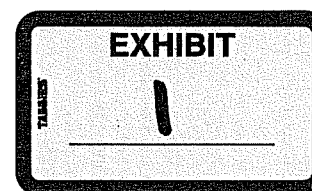
In your letter of December 1, 2008 to Rick Garren you wrote:

"In lieu of re-production [of material provided to us by the State], we have asked each expert provide us with a list of State materials considered. Where those have been received they are provided herewith. We do not yet have a list from every expert. We will continue to press for these and produce them to you as we receive them."

It has now been over one month since the Court-ordered date on which Defendants were to produce the expert considered materials referenced in your December 1 letter. As you admit, the expert reports as presented to the State on December 1 do not include all of the required considered materials.

Rule 26(a)(2)(B) provides that you must produce "the data or other information considered by the [testifying expert] witness in forming the opinions." "Documents are 'considered' under Rule 26(a)(2)(B) if the expert has read or reviewed the...materials before or in connection with forming his or her opinion." *JB ex rel. Palmer v. ASARCO, Inc.*, 225 F.R.D. 258, 261 (N.D.Okla. 2004) (quoting *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 306 (W.D.Va. 1998)).

The expert materials and disclosures furnished by Defendants to date simply do not meet the requirements of Rule 26(a)(2)(B). More specifically, the State cannot



determine which materials were actually considered by the experts in forming their opinions. For example, in Herbert DuPont's report he states:

"I have reviewed a large volume of material provided by the state in this suit and the various Expert Reports and depositions of the State's consultants: Darren L. Brown, PH, Lowell Canedy, PhD, Bernard Engle, PhD, P.E, J. Berton Fisher, PhD, Valerie J. Harwood, PhD, Gordon V. Johnson, PhD, Todd W. King, PE, BCEE, Robert S. Lawrence, MD, Dr. R. Jan Stevenson, Dr. C. Robert Taylor and Christopher M. Teaf, PhD. I have also reviewed the materials these consultants considered in forming their opinions."

DuPont report, p. 4. Dr. DuPont's vague statement that he has "reviewed a large volume of materials provided by the state" is facially inadequate. From this statement, the State can only guess which documents from the State's massive productions Dr. DuPont reviewed. We trust that such a vague statement is not what you had in mind when you promised to provide "a list of State materials considered." In any event, we need a list of the *specific* documents from the State's production each expert reviewed. Dr. DuPont exemplifies Defendants' failure to provide adequate specificity. Furthermore, Dr. DuPont's universal declaration that he has reviewed all of the material considered by all of the State's experts is hardly credible. First, the sheer volume of materials considered by these experts would make such a review impractical and unfeasible. Second, because the focus of many of the listed experts had no relevance to Dr. DuPont's opinions, this suggests that he is merely dumping a summary list of materials, effectively hiding those materials which he actually considered. Such a broad declaration does not comply with Rule 26(a)(2)(B). It is the equivalent of providing the card catalogue of a library and claiming that the expert "considered" the library in arriving at his opinions.

Perhaps at the other extreme is Herman Gibb. Within Dr. Gibb's purported considered material one finds just two discrete scientific journal articles that were produced by the State as part of Dr. Chris Teaf's considered materials. As used in Rule 26(a)(2)(B), "considered" is a broader term than "relied upon" and "includes the material the expert examines but rejects." *JB ex rel. Palmer*, 225 F.R.D. at 261 (citation omitted). It is not credible that Dr. Gibb chose to review only two of the numerous articles from Dr. Teaf's considered materials and no others -- if only to reject them. The State needs full disclosure of all the specific materials reviewed by Defendants' experts whether such materials were actually "relied upon" or not.

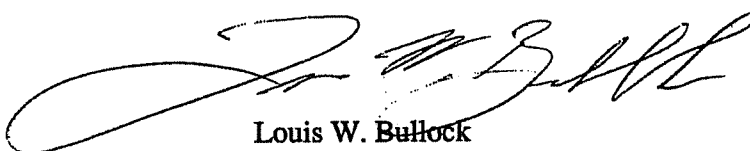
It has also come to our attention that materials produced with Dr. Myoda's report are severely lacking. We still do not have a C.V. for Dr. Myoda, nor a disclosure of prior testimony. In addition, Defendants have failed to produce sampling procedures, chains of custody and certain raw data generated in connection with Defendants' sampling activities and considered by Dr. Myoda. The State is preparing a separate letter detailing each of the known sampling-related production omissions.

Additionally, some of the considered materials appear incomplete on their face. Dr. Coale's considered materials should have included what appears to be a Power Point presentation, Bates labeled Coale 000101-121. However, only one page of that presentation (Coale 000101), the title page, was actually produced. We need Defendants to produce the balance of that presentation immediately, as well as any other materials considered by Dr. Coale but not yet produced.

These are several examples of the pervasive problems with Defendants' expert production to date. Defendants cannot reasonably expect the State to proceed with expert depositions so long as these problems persist. Until such time as Defendants have produced complete considered materials from all testifying experts in compliance with Rule 26(a)(2)(B), the State may not be able to proceed with expert depositions as planned. Because the parties have agreed to several deposition dates in January and February, it is imperative that Defendants move quickly if those dates are to be saved. For instance, Dr. DuPont's deposition is currently set for February 4. If the above-described deficiencies are not rectified immediately, the February 4 date will be compromised.

We request that you immediately provide: either a copy of all of the materials each expert considered; or for items which have State-affixed Bates numbers on them, a list of each such item and the specific Bates numbers of the items considered. As you are aware, Defendants prevented the State from discovering which documents from the agency productions Defendants were copying. For that reason, you will need to actually produce copies of agency documents that do not bear a State-affixed Bates number.

Sincerely,



Louis W. Bullock

LWB/bdj

cc via email:

John Elrod, Esq. (jelrod@cwlaw.com)
John Tucker, Esq. (jtucker@rhodesokla.com)
Michael Bond, Esq. (michael.bond@kutakrock.com)
A. Scott McDaniel, Esq. (smcdaniel@mhla-law.com)
James Martin Graves, Esq. (jgraves@bassettlawfirm.com)
Jennifer Stockton Griffin, Esq. (jgriffin@lathropgagage.com)
Robert E. Sanders, Esq. (rsanders@youngwilliams.com)